

**FILED**  
THOMAS D. HALL

**COPY**

**NOV 06 2000 BEFORE THE JUDICIAL QUALIFICATION COMMISSION  
STATE OF FLORIDA**

CLERK, SUPREME COURT  
BY \_\_\_\_\_

**INQUIRY CONCERNING A JUDGE,  
NO. 99-10 MATTHEW E. MCMILLAN**  
\_\_\_\_\_ /

**Supreme Court Case No. 95,886**

**MOTION AND MEMORANDUM TO QUASH SUBPOENA ON PAUL SHARFF**

COMES NOW Paul Sharff, through undersigned counsel, and files this Motion to quash a subpoena for trial served upon him by counsel for Judge McMillan, Arnold Levine. As grounds, Mr. Sharff states:

Paul Sharff is a real estate broker living in Bradenton, Florida. Mr. Sharff was served with a trial subpoena that is both defective on its merits and technically. Mr. Sharff requests a hearing on this Motion prior to be required to testify. Otherwise, questions will be asked based on an illegal wiretap, in violation of both Florida and federal law.

**A. The Illegal Wiretap:**

The testimony sought by the subpoena is based on an illegal taped intercept of Mr. Sharff. Illegal wiretaps and tapings are felonies under Florida law, and may be employed for no purpose whatsoever, directly or indirectly, under the law.

Matt McMillan taped Mr. Sharff in a conversation with Mr. McMillan about the upcoming political race against Judge Brown. The tape was without Mr. Sharff's awareness or consent. Some time after this illegal taping occurred, Judge McMillan's wife called Mr. Sharff to her office, and showed Mr. Sharff a transcript of the illegal tape. She stated, in essence, that Mr. Sharff would be "ruined" by the tape, but Mrs. McMillan could "make it go away" if Mr. Sharff

would sign an affidavit to the effect that Judge McMillan was the victim of a conspiracy.

Mr. Sharff left Mrs. McMillan's office and reported the entire incident to local law enforcement. Judge McMillan possesses a copy of the tape and has refused to release it. He has tacitly purported to quote from it at length in his Answer, filed August 26, 1999. In addition to citing from the purported transcript at length, Judge McMillan and former counsel attempted to use this illegally obtained tape to intimidate Mr. Sharff and impact his deposition through questions and cross-examination based upon it.

Judge McMillan or his former lawyers have also sought to create a diversion and intimidate Mr. Sharff by providing the tape to the United States Attorney's Office in Tampa. McMillan's former counsel gave the tape to the federal prosecutor who has taken an interest over the years in prosecuting Manatee County cases. Besides an attempt to intimidate, this conduct sought to create a diversion of a federal investigation, apparently to divert attention from other issues and to intimidate Mr. Sharff. The intimidation certainly worked, as Mr. Sharff reluctantly accepted his lawyer's recommendation at his deposition to assert the fifth amendment.

Judge McMillan possesses the deposition transcript of Mr. Sharff. Should he wish to create a spectacle or further embarrass Mr. Sharff, he can read this deposition at trial.

The unconsented taping of another is a third degree felony in Florida. Fla. Stat. 934.03(4)(a). A tape thus illegally obtained cannot be used for any purpose whatsoever, nor can matters derived from that tape be used. Fla. Stat. 934.06. Questions cannot be based upon it. Information derived from it is inadmissible for all purposes whatsoever. Id. Florida law simply precludes such questions.

Likewise, under federal law an illegal electronic intercept may be used for no purpose whatsoever, not to obtain evidence, nor to cross-examine. 18 U.S.C. 25100 - 2520. Gelbard v.

United States, 408 U.S. 41 (1972). Under the Gelbard doctrine, which also applies in Florida courts, a witness may even refuse to answer a question of a lawful grand jury if he believes it is derived from an invalid intercept.

The principles of Gelbard and Florida Statutes section 934.06 control here. The illegal electronic interception of Mr. Sharff's statements preclude the questioning of Mr. Sharff on any subjects illegally taped by Judge McMillan. At the very least, under Gelbard, this panel must conduct an inquiry or hearing as to the nature of the illegal electronic interception, to pass upon the legality of the surreptitious tape and its making. In Re. Grand Jury Proceedings, 613 F.2d 1171 (D.C. Cir. 1979); Melickson v. United States, 547 F.3d 416 (8<sup>th</sup> Cir.), cert. denied, 430 U.S. 986 (1977). The party seeking the testimony should produce the tape and transcript into the record, and the panel should make inquiry as to the manner of the surreptitious taping.<sup>1</sup> No person may be subjected to questioning based upon an illegal electronic intercept.

**B. The Subject Matter is Irrelevant:**

It is clear that Mr. Sharff has no personal knowledge related to these charges. He is not a lawyer and have no involvement in Judge McMillan's advertising, recusal decisions, or any other matter related to these charges. Judge McMillan desires Mr. Sharff's presence merely for the "publicity splash effect" or to embarrass Mr. Sharff. Judge McMillan's theory is that Mr. Sharff is an agent of the "Good Ole Boys" cabal. This defense is irrelevant to the issues, and was so ruled irrelevant by the Judge at the start of this trial. This portion of the defense can best be labeled shenanigans.


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<sup>1</sup>We are *very* certain Judge McMillan will refuse to tender the tape and transcript into the record, for reasons related to his own criminal exposure in creating it. He should make this tape available to the Court and to Mr. Sharff's counsel.

**C. The Subpoena is Technically Faulty:**


The subpoena should be quashed as it was served without the statutorily required witness check and mileage. No subpoena can command a witness without same. No witness may be punished for not appearing at court if a check is not so tendered with the subpoena. Trawick, Florida Practice and Procedure. 22-6 at 344 (1998 ed.), citing *In Re. Estate of Coveny*, 324 So.2d 681 (4<sup>th</sup> DCA 1976). Fla. Stats. 92.142 sets forth witness fees. Nor can a witness be required to attend court multiple days (as Sharff's lawyer did for him) without checks being tendered to these days. *Id.*

Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a complete copy of this pleading was served by fax and U.S. Mail upon Arnold Levine, Esquire, 100 S. Ashley Dr., Suite 1600, Tampa, Fl. 33602; and by fax and U.S. Mail upon Marvin Barkin, counsel for Tom MacDonald, P.O. Box 1102, Tampa, Fl. 33601; and by U. S. Mail and facsimile upon John Beranek, P.O. Box 391, Tallahassee, Fl. 32302.

  
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